No. 85-1277

In the Supreme Court of the United States

OCTOBER TERM, 1986

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA, *et al.*,
Petitioners

v.

GENE H. ARLINE,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the contagious, infectious disease of tuberculosis constitutes a "handicap" within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.

2. Whether one who is afflicted with the contagious, infectious disease of tuberculosis is precluded from being "otherwise qualified" for the job of elementary-school teacher, within the meaning of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A, 1-11) is reported at 772 F.2d 759. The opinion of the district court (Pet. App. C, 13-16) is not reported.

JURISDICTION

The opinion of the Court of Appeals (Pet. App. A, 1-11) was entered on September 20, 1985. A petition for rehearing was denied on November 8, 1985 (Pet. App. B, 12). The petition for writ of certiorari was filed on January 27, 1986, and was granted on April 21, 1986. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES INVOLVED

29 U.S.C. 794 states:

> No otherwise qualified handicapped individual in the United States, as defined in Section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. 706(7)(B) states:

> Subject to the second sentence of this subparagraph, the term "handicapped individual" means . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

STATEMENT OF THE CASE

In January of 1966, Mrs. Gene Arline began work as a teacher on an annual contract for the Nassau County School Board. In 1969, the school board gave her a continuing contract (J.A.54),[1] in the nature of tenure.

In 1979, Mrs. Arline was in her thirteenth year of competent service (J.A.52) as a tenured teacher when the school board fired her. It took this action after

[1] Citation to "J.A." designates the Joint Appendix. Citation to "Tr." designates the trial transcript.

learning that Mrs. Arline had tested positively for tuberculosis three times in 1977 and 1978.

Mrs. Arline first contracted tuberculosis in 1957, at the age of fourteen. She was hospitalized at that time, but doctors subsequently advised her that she was cured. When she applied for employment with the school board in 1966, she had not shown any sign of tuberculosis for nine years.[2] Mrs. Arline had no sign of tuberculosis for the following eleven years until 1977 when she tested positively on a sputum culture. Cultures taken in March and November of 1978 also tested positively (J.A.12). She was successfully treated after the first two tests, and returned to work following leaves of absence. After she tested positively a third time, the school board placed her on leave and subsequently fired her (J.A.50-51). Although it was a policy of the school board to assign teachers to classes outside of their field of certification, this alternative was not extended to Mrs. Arline because of her handicap. She was terminated outright (J.A.56-57).

A. Mrs. Arline was terminated solely because of her illness

Mrs. Arline was fired solely because she had suffered from tuberculosis in 1957 and had three positive culture

[2] The school board makes much of an irrelevant presumption, presented as fact, that Mrs. Arline was dishonest in applying for her job by failing to disclose that she had been hospitalized for tuberculosis when she was fourteen years old. (Petitioner's brief at p. 2, 11, 41, 42) The record, however, reveals that Mrs. Arline was advised by her doctors that she was cured (Tr. 69) long before applying for the job and answering the vague, general questions on her application form. The school board's argument is irrelevant because there is no record evidence that she was fired in 1979 due to answers given in 1966.

The logical inference drawn from the school board's presentation of this information is they would have discriminated against Mrs. Arline by refusing to hire her in the first instance had they known of her handicap.

tests in 1977 and 1978 (J.A.48-52). The school board took the position that the pattern of relapses suggested Mrs. Arline may have more relapses as she ages. Trial testimony given by the superintendent of schools, Craig Marsh, revealed that he made a formal recommendation to the school board to dismiss Mrs. Arline. The superintendent testified about two reasons upon which he based his decision to recommend permanent termination: the risk of infection to others and public reaction. He characterized her illness as the "continued reoccurence [sic] of tuberculosis" (J.A.51). He had no other reason, such as incompetence or misconduct, for his recommendation, but based his decision solely on her physical condition[3] (J.A.52).

Regarding the risk of infection, the superintendent exceeded the recommendation of Dr. Marianne McEuen, the Assistant Director of the Community Tuberculosis Control Service. Dr. McEuen testified that she had considered the risk of Mrs. Arline infecting small children "very minimal" but recommended Mrs. Arline not be allowed to teach third grade students at that time because there might be a possibility of further relapses (J.A.13,14). However, Dr. McEuen rejected the suggestion that Mrs. Arline would have continuing relapses as she grew older:

> I think I said—I'll say the same thing I said before: I hope that Mrs. Arline is cured, I hope that she will never have another relapse. We are fairly confident that she probably will not. In other words, I can't say—*I know you're trying to make me say she's going to continue to have relapses, I think, and I can't say that.* (J.A.31) (emphasis added)

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[3] Nothing in the record indicates any effort by the school board to reevaluate Mrs. Arline's particular case in the four months from her April, 1979 leave until the resumption of classes the following fall.

The doctor took into account the fact that third grade students remain in the same classroom all day long. This was a factor in her recommendation because the longer the exposure to a "possible" case of tuberculosis, the possibility of infection becomes more likely (J.A.17). However, the doctor also explained that if children were not in the same room for long periods of time, the risk is much less and would be "acceptable" (J.A.18-19). Dr. McEuen did not advise outright termination, but suggested that Mrs. Arline could teach older students (J.A.15,19) or work in an administrative capacity (J.A.18-19). Any such risk to third parties while she performed those duties would be acceptable within professional risk control standards (J.A.16-18,31-34), because the chance of infecting someone was "so remote." (J.A.33-34)

The doctor testified that suffering from tuberculosis is not in itself a sufficient reason for general disqualification from "public employment" (J.A.21). To the question of whether there was anything in Mrs. Arline's record which would lead her to believe that Mrs. Arline should not be working in a public job other than in a third grade setting, the doctor answered "No" (J.A.22).

Dr. McEuen testified that the last record the Community Tuberculosis Control Service had for Mrs. Arline was May 29, 1981, and at that time she was negative (J.A.19-20). Dr. McEuen did not know whether Mrs. Arline has had any positive tests since that date. She stated "I have no record of them. I assume—since it's a reportable situation, I would assume that it wasn't" (J.A.20). Mrs. Arline testified that the last time she had a positive test was the test in 1979 (Tr.65). The last time she was required to go through a test to determine the presence or absence of tuberculosis was in the summer of 1981. She is no longer scheduled to go back periodically for these continuing tests (Tr.76).

The second factor which caused the superintendent to recommend termination was the lay reaction expressed by parents and school board personnel.[4] When asked if in his judgment there was some question involved other than a medical question, the superintendent responded "[v]ery definite [sic]. . . ." (J.A.63). Another portion of his testimony on this point, which was overlooked by the Petitioners and all *amici* for the Petitioners, is most critical and is set forth below:

> Q. In making that recommendation, did you have input from other members of the county staff and parents?
>
> A. Very much so, yes, sir.
>
> Q. Was that a factor?
>
> A. Yes, sir, very definitely was.

(J.A.81-82).

B. The school board made no effort to accommodate Mrs. Arline

The school board failed "even to consider whether reasonable accommodation could be made . . ." for Mrs. Arline's handicap. *Arline v. School Board of Nassau County*, 772 F.2d 759, 765 (11th Cir. 1985). On that issue, the Superintendent's testimony was clear:

> Q. Did you discuss the matter with Dr. McEuen?
>
> A. Yes.

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[4] During the administrative hearing before the school board, the superintendent testified that "the community was quite upset," that he had received verbal and written complaints, and that people feared Mrs. Arline's tuberculosis might be spread throughout the air conditioning system. The hearing transcript was admitted as Exhibit E at trial (Tr.59) but exhibits were not transmitted with the record on appeal by the district court clerk's office. (Pl. Ex. E; 16-18).

> Q. At any time did you investigate the possibility of allowing Mrs. Arline to work in some other capacity within the school system?
>
> A. No, sir, I did not.
>
> Q. In other words, you made no attempt to ask the doctors whether or not she could safely teach adults or high school students; would that be correct?
>
> A. I didn't pursue it, that's correct.

(J.A.53).

According to the superintendent, Mrs. Arline's continuing contract of employment did not require her to teach in any particular grade. Under her contract, she could teach in the tenth, eleventh or twelfth grade (J.A. 55). Mrs. Arline's certification was "K through 6" elementary education. (J.A.54)[5] However, under local board policy Mrs. Arline could have taught at the high school level even though her certification was in elementary education (J.A.54-55). In fact, as the trial court found, the Board had a policy by which teachers taught outside their field of certification (Tr.109).

Since Mrs. Arline's dismissal, positions in both secondary and adult education became available, but the Board did not offer any of them to Mrs. Arline (J.A.61) despite the fact that she has not had a positive test since 1979 (Tr.65). The system also has a variety of non-instructional positions (J.A.59), none of which had been offered to Mrs. Arline (J.A.61).

The superintendent testified that Mrs. Arline was not offered any other position with the board because there was some perceived danger involved, and he "felt" that it would benefit the public to terminate her (J.A.62). He acknowledged the doctor's expert testimony that the danger of infecting others was so low that it would be

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[5] The school board did have elementary schools in the system where sixth grade students rotated classes, which would eliminate the problem of prolonged exposure. However, this was not explored as an accommodation of Mrs. Arline's impairment (J.A.82-83).

an acceptable risk to allow Mrs. Arline to teach older students and adults (J.A.62-63). Nonetheless, he stated that despite that medical opinion, his own opinion was that he did not feel that he had to offer her a position because of his responsibility to protect the other students and employees (J.A.63-64). He did not explain why the board had permitted Mrs. Arline to return to work after she had been successfully treated in conjunction with the first two tests, but peremptorily fired her after the third test. However, a close reading of his testimony (J.A. 51,81) reveals that after he discovered Mrs. Arline had tested positive a third time, he concluded that she would suffer from continued recurrences of tuberculosis:

> [Y]ou know, after all—after the third time that I had knowledge of Mrs. Arline's recurring condition, which was infectious at the time of each reoccurrence, that I felt like it in the best interests of the school system of Nassau County that she be dismissed from the classroom (J.A.81).

Since her dismissal by the school board in 1979, Mrs. Arline has not been employed even though she has attempted to look for employment (Tr.65). She testified that she has been unable to obtain a teaching position in Duval County, a neighboring school district:

> Well, more recently I've tried to obtain a teaching position here in Duval County, but I haven't been able to because I cannot get references from Nassau County, and this is the only thing that's holding up my application here (Tr.66).

C. Proceedings below

Mrs. Arline had two adversarial hearings before the school board, which resulted in terminations in both cases. She filed an administrative appeal of her dismissal to the State Board of Education.[6] The State Board

[6] The Florida State Board of Education consists of the Governor and the Members of the Cabinet. Fla. Const. art. IX § 2. The Cabinet is composed of the Commissioner of Education, the Secretary of State, the Attorney General, the Comptroller, the Treasurer, and the Commissioner of Agriculture, Fla. Const. art. IV, § 4.

adopted the findings of a hearing officer that there was no substantial competent evidence in the record to support the school board's finding. They rejected the Nassau County School Board's termination order and ordered Mrs. Arline be reinstated with back pay. (J.A.61-62) The school board appealed the State Board's decision to the Florida First District Court of Appeal, which by a 2-1 vote reversed the State Board's decision and reinstated the decision to terminate Mrs. Arline. *School Board of Nassau County v. Arline*, 408 So.2d 706 (Fla. 1982) Dist. Ct. App.[7] The dissenting judge would have affirmed the State Board's final order because, under Mrs. Arline's continuing contract of employment, there was no authorization to allow the board to discharge her for physical incapacity caused by personal illness. *Id.* at 709 (Ervin, J., dissenting).

On March 23, 1982, Mrs. Arline commenced an action in the United States District Court for the Middle District of Florida, alleging, *inter alia*, that her termination was a violation of Section 504 of the Rehabilitation Act of 1974. After a brief bench trial on November 17, 1983, the court issued an oral ruling against Mrs. Arline on all counts (Tr.107-110). Although acknowledging that Mrs. Arline had an unfortunate handicap, the court ruled that because tuberculosis was an infectious disease, it is not a handicap within the meaning of the Rehabilitation Act. The court also found that although the school board had a policy which permitted teachers to work outside their fields of certification, they were not under an obligation to do so and had no duty to keep a person with a contagious disease employed.

Mrs. Arline appealed this decision to the United States Court of Appeals for the Eleventh Circuit, which reversed

[7] However, the majority stated that it might not have reached the same conclusion had they been sitting as the school board. 408 So.2d at 708.

and remanded the district court's decision. *Arline v. School Board of Nassau County*, 772 F.2d 759 (11th Cir. 1985). The appellate court ruled that the language of the statute and the applicable regulations show that tuberculosis constitutes a handicap within the meaning of the Rehabilitation Act. Additionally, because the district court did not make any factual findings as to whether Mrs. Arline was otherwise qualified, or whether the costs involved in accommodating her would place undue burdens on the school system, the Eleventh Circuit remanded the case for further findings on this "fact-specific" issue. *Id.* at 764. On remand, the Eleventh Circuit directed the district court consider whether the board's "justifications . . . are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice," *Id.* at 765. This Court subsequently granted the school board's petition for writ of certiorari, and Mrs. Arline's motion for leave to proceed *in forma pauperis*.

SUMMARY OF THE ARGUMENT

The petitioner school board is not entitled to discriminate against Mrs. Gene Arline with impunity by terminating her after 13 years of competent service because she suffers from tuberculosis. Teh petitioner is a federal grantee subject to the requirements of the Rehabilitation Act, which prohibits discrimination against "any individual who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such impairment." 29 U.S.C. 706(7). Mrs. Arline's tuberculosis is a substantially limiting impairment and has been regarded as such by the school board.

Longstanding regulations also establish that impairments of the respiratory system and impairments of life activities including breathing and working are handicaps. Tuberculosis is clearly a handicap for Mrs. Arline.

Legislative history demonstrates that Congress acted to prevent discrimination founded on fear, prejudice, ignorance or stereotype. Certainly medical information demonstrates that tuberculosis, like other handicaps, cannot be correctly understood or accommodated by reference to stereotypic assumptions. The statute and its history simply do not countenance the *per se* exclusion from the Act of those impaired by an infectious or contagious disease. The United States Government and the school board are erroneous in their contention that contagion is separable from the underlying disease, and therefore discrimination based on an ignorant fear of contagion is outside the scope of the Act. This analysis does violence to the statutory purpose of eradicating prejudice, fear and ignorance in assessing the abilities of the handicapped. Rather, Congress intended to maximize employment opportunities through a system guided by medical fact, analyzing on a case-by-case basis the actual medical circumstances of each handicapped individual.

The Court does not need to reach the issue of whether Mrs. Arline is "otherwise qualified" to work in the Nassau County school system. While the board had a policy allowing teachers to teach out of certification, this alternative, which is available to the nonhandicapped, was not considered in Mrs. Arline's case even though the undisputed medical testimony demonstrates that teaching older students would be "acceptable."

The question of whether a handicapped person is otherwise qualified is fact-specific, determined by whether reasonable accommodations will enable the handicapped to make productive contributions. The school board did not consider accommodating Mrs. Arline's handicap before firing her and did not rebut her prima facie showing of the availability of reasonable accommodations. The district court made no findings on this issue, and the Eleventh Circuit properly remanded for further proceedings.

ARGUMENT

I. TUBERCULOSIS IS A HANDICAP WITHIN THE MEANING OF THE REHABILITATION ACT

A. General Background on Tuberculosis

Before examining the legal principles which demonstrate that tuberculosis is a handicap, it is helpful to address the most salient characteristic of the disease itself.

The record concerning the disease of tuberculosis is, frankly, quite thin and is disputed by various *amici*. For this reason the Eleventh Circuit's order of remand seems appropriate. The record does indicate what accepted medical treatises demonstrate: that the disease is not highly contagious and contagion varies with each individual; that there are means available to test contemporaneously; that treatment is effective and promptly eliminates contagion.

Tuberculosis is a disease which affects major life functions. It primarily affects the respiratory system, and includes such symptoms as cough, chest pain, weight loss, fever and night sweats. The extent and nature of symptoms depends upon the degree of the disease. It has the potential to limit a major life function, such as breathing, walking or working (J.A.7; Brief of the American Medical Association as Amicus Curiae in support of Petitioners at 6 (hereinafter cited as AMA Brief)).

More than fifteen million Americans are infected with the tuberculosis germ. (AMA Brief at 5; Brief of the American Health Association, American Civil Liberties Union, American Nurses Association, and National Association of Protection and Advocacy Systems as Amici Curiae in support of Respondent at 5 (hereinafter cited as APHA Brief)). However, only a small percentage of these infected people actually develop the disease and become capable of transmitting the infection to other

people (AMA Brief at 5). Among those people who are capable of transmitting the disease, the degree of contagiousness varies from case to case (AMA Brief at 6).

According to modern medical knowledge, the disease is not considered to be highly infectious (J.A.16; APHA Brief at 9). The level of contagiousness varies case by case and depends upon a number of interrelated factors. The number of bacilli in the diseased person's sputum,[8] the closeness and length of contact, and the presence or absence of ventilation and sunlight all determine whether there is a risk of infection from a person who has developed the active disease of tuberculosis (J.A.38; AMA Brief at 5-6; APHA Brief at 2-3).

There are two medical tests in use to determine whether a person infected with the tuberculosis germ is contagious. The classic method of diagnosis is by culturing the bacteria, which takes several weeks (J.A. 23-26; AMA Brief at p.5; APHA Brief at 13-16). The other method of diagnosing infectiousness is by microscopic examination of a stained sputum smear to detect the number of bacilli present (J.A.40-41; APHA Brief at 13-14; AMA Brief at 5). The test is performed by having the person cough up and the sputum is placed under a microscope. If the germs (the acid-fast bacilli) are present, which are visible under the microscope, that person is considered infectious (J.A.40-41). The sputum smear can be examined immediately so that no delay is necessary (APHA Brief at 13).

People with the disease of tuberculosis are no longer quarantined or isolated (AMA Brief at 6-7; APHA Brief at 12, 17-18). When properly treated with drugs, people with the disease of tuberculosis become noninfectious

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[8] During the administrative hearing, the doctor agreed with the statement that Mrs. Arline's last test showed the lowest number of bacteria one could have in a culture and still be positive. (Pl. Ex. E; Tr.59, p.46). *See supra* p.6 note 4.

within a period of time of a few days to a few weeks (AMA Brief at 7; APHA Brief at 8). Those people with the disease tuberculosis can return to work immediately after an examination if there is no bacteria microscopically detected in the sputum (AMA Brief at 7).

B. Under the clear language of the Act, people with the handicap of tuberculosis are protected against discrimination

"The starting point of any inquiry into the application of a statute is the language of the statute itself," *United States Department of Transportation v. Paralyzed Veterans*, 106 S. Ct. 2705, 2710 (1986); *North Haven Board of Education v. Bell*, 456 U.S. 512, 520 (1984). It is difficult to conceive of more expansive language that the statutory definition of a "handicapped person" under Section 504. The Act protects:

> any individual who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such impairment.

29 U.S.C. 706(7).

Posed against this sweeping language is the complete absence of any exclusion of a contagious impairment. The language of the statute is unambiguous. The inclusive term "physical impairment" is not limited in any manner and there is no suggestion from the plain meaning of the statute that contagious diseases are not covered. In addition to the clear meaning of the language of the statute, there are other reasons why this Court should not adopt the school board's request to judicially exclude from the coverage of the Act those whom Congress did not.[9]

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[9] In *Bowen v. American Hospital Ass'n*, 106 S.Ct. 2101, 2126 (1986) three members of this Court rejected a proposal to engraft a judicially created limitation—age in that case—onto the Rehabilitation Act. "There is no reason for importing an age limitation into the statutory definition . . . ." (Justices White, Brennan and O'Connor, dissenting.)

Congress intended the Rehabilitation Act to serve a broad remedial purpose. *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984). Because the Act is remedial in nature, this Court's plain reading of the statute is guided by the same principles underlying construction of Title IX of the Civil Rights Act. A judicially created broad, automatic exemption of any person who has a contagious disease would be contrary to these previously enunciated principles.

Congress intended Section 504 to be "part of the general corpus of discrimination law." *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644, 649 (2d Cir. 1979). *See also Bell*, 456 U.S. at 521. Congress enacted the Rehabilitation Act of 1973 soon after the Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which held that once a plaintiff has established a *prima facie* case of discrimination under Title VII of the 1964 Civil Rights Act, the burden of proof shifts to the defendant to rebut that assertion. The Second Circuit noted that "Congress must have been aware that the discrimination law language would have obvious implications for the burden of proof issue." *Carey*, 612 F.2d at 649 n.5. Additionally, Section 120 (a) of the 1978 Amendments to the Rehabilitation Act makes the rights, remedies and procedures available under Title VI of the Civil Rights Act of 1964 applicable to Section 504 of the 1973 Rehabilitation Act. This reveals that Congress intends the burdens of proof under Section 504 be treated as are those in other discrimination actions.

As the Court of Appeals ruled below, Mrs. Arline's suffering from tuberculosis fits "neatly" into the statutory framework of Section 504. *Arline v. School Board of Nassau County*, 772 F.2d 759, 764 (11th Cir. 1985). Tuberculosis is unquestionably a physical impairment

within the language of Section 504 as a "physiological disorder" "affecting" the lymphatic and respiratory systems (J.A. 7; AMA Brief at 4-8). Congress has expressly provided that "respiratory or pulmonary dysfunction can constitute a " 'severe handicap' " 29 U.S.C. 706(13) for purposes of targeting vocational rehabilitation services to those who need them most. Clearly, tuberculosis is a respiratory or pulmonary dysfunction, AMA Brief at 4 and the intensity of the disease itself would determine whether it is a handicap or a severe handicap. Therefore, if tuberculosis is a "severe handicap" under the statute, it logically follows that a case of tuberculosis which impairs life functions, or is regarded as such, is also a handicap under the statute.

At the time of Mrs. Arline's hospitalization, her impairment substantially limited her ability to breathe, as it later affected her ability to work (J.A.11). 29 U.S.C. 706(7)(B)(i). Both are major life activities as defined by Section 504. *See E.E. Black, Ltd. v. Marshall*, 497 F.Supp. 1088 (D. Hawaii 1980). Mrs. Arline was hospitalized as a youth as a result of her tuberculosis (J.A. 11), and thus "has a record of" this impairment. 29 U.S.C. 706(B)(ii). Certainly she "is regarded as having" the impairment of tuberculosis, 29 U.S.C. 706(B)(iii) by a school board which fired her in part due to irrational fears of parents and school personnel, and thereafter did not provide her a job reference. Therefore, as an adult, her record of tuberculosis has continued to substantially limit her ability to be gainfully employed (J.A.66), even though she has not tested positive since 1979 (J.A.20; Tr.65).

Adoption of the board's automatic exemption of communicable disease (and discriminatory behavior based on fear of contagion) from the Act's coverage would render its language meaningless and sanction decisions which are based on fear. The statutory scheme protects not only people suffering from an impairment, but also those who have a *record* of impairment, or are merely

regarded as having an impairment. *Per se* exclusion of people with contagious diseases or who engender fear of contagion would totally eviscerate subsections 706(B)(ii) and (iii) of the Act by precluding coverage of those who at one time in their lives suffered from a contagious disease, but no longer do. Such an exclusion would also preclude coverage of those whose impairment is not contagious, but merely thought to be.

C. The legislative purpose and history of the Act support the ruling that persons with tuberculosis are "handicapped individuals"

The board seeks to justify its action in discharging an employee solely because of her physical condition by arguing that she is not covered at all by an Act which Congress enacted "to promote and expand employment opportunities" for the handicapped. 29 U.S.C. 701(8); *Consolidated Rail*, 465 U.S. 624 (1984). The board argues that because contagious diseases were not considered by Congress, this Court should infer exclusion of such impairments. The argument ignores the obvious, that Congress avoided undertaking an exhaustive listing of covered impairments; none are catalogued by the statute. Moreover, the clear legislative history demonstrates that Congress has previously considered and rejected the fundamental premise of the board's argument that a perceived safety risk justifies categorical exclusion of certain handicapped people.

This Court has frequently looked to the legislative history of Section 504 to resolve questions of its coverage; *e.g., Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 718-19 (1985); *Consolidated Rail*, 465 U.S. at 624; 104 S.Ct. at 1254 n.13. ("[L]anguage as broad as that of Section 504 cannot be read in isolation from its history and purposes.") A review of that history [10] demonstrates

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[10] A detailed analysis of the legislative history of Section 504 is presented at 18-45 in the Brief of Senators Cranston, *et al.*, and

that Congress resolved to protect impaired persons from discrimination based on irrational misconceptions. Congress was aware that handicapped people suffer discrimination based on widespread myths concerning their limitations, the fear of the perceived risks which their impairments present, outright aversion to how handicapped people look or act, or what non-handicapped people otherwise thought was obnoxious about a particular disease or impairment. *See* 117 Cong. Rec. 45974 (1971) (Remarks of Sen. Vanick) (Discussing fears of the physical threat presented by a cerebral palsied child, and exclusion of a child from school because teacher thought his physical appearance "produced a nauseating effect" or "disturbing influence" on classmates). "Individuals with handicaps are all too often excluded from school and educational programs, barred from employment or are underemployed because of archaic attitudes and laws. . . ." S. Rep. 93-1297, 93d Cong., 2d Sess. (1974). *See also* Congressional Brief at 28, 42-44 for other examples.

Congressional action since the Act's initial passage in 1973 reflects the intent of the legislations to broaden, not narrow, the scope of those protected. When the Act was first passed in 1973, the definition of handicap was narrowly set forth to cover only those with physical or mental disabilities which resulted in a substantial handicap to employment. In 1974, a new definition replaced one which Congress found "far too narrow and constricted. . ." S. Rep. 93-1297, 93rd Cong., 2d Sess. (1974) to include all those who suffer from discriminatory practices in employment on the basis of either an actual or perceived condition. 120 Cong. Rec. 30531 (1974) The new definition included all those who suffer from discriminatory practices in employment on the basis of an actual or perceived condition. *See also* Congressional Brief at 29-33.

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of Representatives Atkins, *et al.*, as Amici Curiae in support of Respondent (hereinafter cited as Congressional Brief).

In 1978, Congress debated the issue of whether drug addicts and alcoholics should be excluded from the definition of handicapped person, and refused to adopt a blanket exclusion.

In response to safety concerns, the House passed a bill which excluded drug addicts and alcoholics from the definition of a handicapped person. A Senate bill, which was later adopted by both bodies, declined to adopt the House's blanket exclusion of specific groups of handicapped people. Instead, the Senate bill merely clarified that employers could not discriminate against handicapped people who were qualified. 124 Cong. Rec. 30322-30325 (1978). *See also* Congressional Brief at 19-22. Based on this history, it is obvious Congress decided that safety concerns should be considered only within the context of determining whether a person is "otherwise qualified," not whether the impairment falls within the definition of a "handicap."

This rationale is applicable in this case. Any safety concerns presented by the possibility that a person has a disease which may become contagious does not justify a blanket exclusion of all people with contagious diseases from the definition of "handicap." Rather, the possibility of contagiousness relates to whether the person suffering from such a disease is "otherwise qualified."

Finally, the board contends that the absence of the precise term "contagious disease" from the definition of "handicap" means Congress intended to exclude such diseases. That reading is precisely the opposite of what Congress adopted. The 1977 HEW regulations make clear that the "definition [of handicap] does not set forth a list of specific diseases and conditions that constitute physical or mental impairments *because of the difficulty of ensuring the comprehensiveness of any such list. . .*" 45 C.F.R. Pt. 84, App. 310 (emphasis supplied). As this Court recognized in *Consolidated Rail*, 465 U.S. at 634-635, "the responsible congressional committees partici-

pated in the formulation, and both these committees and Congress itself endorsed the regulations in their final form." Contrary to the school board's argument (Petitioners' Brief at 24), the absence of specific language including contagious diseases under Section 504 does not suggest an intent to exclude. If that were so, virtually all handicaps would be excluded. Rather, this lack of specificity is consistent with congressional concerns about the difficulites inherent in attempting to exhaustively list all impairments to be covered by the Act.

D. Under the applicable regulations, tuberculosis is a handicap

The regulations are "an important source of guidance on the meaning of § 504." *Choate*, 105 S.Ct. at 722 n.24 (citing *Consolidated Rail*, 465 U.S. at 624).

The broad coverage mandated by Congress has been interpreted equally broadly by the federal agencies responsible for implementing the Act. Long before articulation of the Government's novel theory, discussed at 26-29 *infra*, its own agencies adopted very broad, inclusive regulations. The Department of Health, Education, and Welfare promulgated rules governing entities receiving federal financial assistance from that department,[11] and provided that in determining who is a handicapped person:

> (i) 'Physical or mental impairment' means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; *respiratory*, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic; lymphatic; skin; and endocrine; or (B) any mental or phychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. (ii) 'Major life activities' means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, *breathing*, learning, and *working*. (emphasis added.)

45 C.F.R. 84.3(j).

[11] HEW was the agency charged with coordinating enforcement of the Act at the time its regulations were adopted. *Consolidated Rail*, 465 U.S. at 627.

Regulations adopted by agencies charged with administration of the Act continue to provide the definition quoted above,[12] and are entitled to deference by the Court. *Consolidated Rail*, 465 U.S. at 624; *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979). As in the Act, the agency regulations do not exclude persons who are impaired by a disease which is infectious at some point in time from the definition of "handicapped." [13]

E. Case law supports the ruling that tuberculosis is a handicap within the meaning of the Rehabilitation Act

Mrs. Arline's contention that tuberculosis is a disease which substantially limits one or more major life activities has not been seriously challenged by the school board. Dr. McEuen testified that the disease can limit

[12] The school board received its federal funding from the Department of Health, Education and Welfare during the 1978-79 school year (Tr.45, Pl. Ex. C, Tr.59). Responsibility for disbursement of the funds was transferred to the Department of Education in 1980 by Executive Order No. 12212, 45 Fed. Reg. 29557, pursuant to the Department of Education Organization Act, 20 U.S.C. §§ 3441 and 3507. The Department of Education's rules are identical to the cited HEW rules, and are contained in 34 C.F.R. Pt. 104. The HEW regulations have also been adopted by the Department of Justice, which took over responsibility for coordinating agency implementation of the Act. *See* Executive Order No. 12250, 45 Fed. Reg. 72995 (1980) and 46 Fed. Reg. 440686 (1981). *Consolidated Rail*, 104 S.Ct. at 1254 n.14.

[13] Not surprisingly, the Social Security Administration includes infectious tuberculosis as an impairment in its regulations, 20 C.F.R. 404, Subpt. P, Appendix I, 3.00(B).

a major life function, that it affects the respiratory system in general, and that it includes such symptoms as coughing, chest pain, weight loss, fever and night sweats (J.A.6-7). The school board did not dispute this testimony.

This Court has noted the remedial nature of the Rehabilitation Act [14] and held that its provisions are to be accorded a broad construction in order to effectuate its purpose. *Consolidated Rail*, 465 U.S. at 624. In keeping with the broad coverage and remedial purposes of the Act, courts have concluded that there are a variety of afflictions which are handicaps within the terms, of the Act: blindness [15]; hearing impairment [16]; diabetes [17]; dyslexia [18]; Hodgkin's Disease [19]; heart condition [20]; and even unusual sensitivity to tobacco smoke [21]; among others. Mental or emotional disorders have also been found to warrant coverage, including schizophrenia [22]; depression [23]; and retardation.[24]

[14] The Act is patterned after Title VI of the Civil Rights Act. The language of § 504 is quite similar to 42 U.S.C. 2000d-2000e.

[15] *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981).

[16] *Southeastern Community College v. Davis*, 442 U.S. 397 (1979).

[17] *Bentivegna v. United States Dep't of Labor*, 694 F.2d 619 (9th Cir. 1982).

[18] *Stutts v. Freeman*, 694 F.2d 666 (11th Cir. 1983).

[19] *Goldsmith v. New York Psychoanalytic Inst.*, 22 Empl. Prac. Dec. (CCH) ¶ 30,764 (N.Y. App. Div. 1980).

[20] *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983).

[21] *Vickers v. Veterans Administration*, 30 Empl. Prac. Dec. (CCH) ¶ 33099 (W.D. Wash. 1982).

[22] *Gladys J. v. Pearland Indep. School Dist.*, 520 F. Supp. 869 (S.D. Tex. 1981).

[23] *Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, 704 F.2d 1402 (5th Cir. 1983).

[24] *City of Cleburne v. Cleburne Living Center*, 105 S.Ct. 3249 (1985).

The law does not automatically exclude any impairment which is thought to be contagious or otherwise harmful to others. In one case, in fact, the court found mentally retarded children with potentially infectious serum hepatitis were handicapped within the meaning of the Act, *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d at 644. In *Carey*, the court noted that serum hepatitis could possibly be transmitted to others. However, relying on Rehabilitation Act the court held:

> The children in this suit are clearly handicapped within the meaning of Section 706(7). They were excluded from regular public school classes and activities 'solely by reason of their handicap' since only mentally retarded youngsters who were carriers of the hepatitis B antigen were isolated; no effort was made to identify and exclude normal children who were carriers. Section 504 is thus fully applicable to this case.

Id. at 649. Although the case did not squarely hold that serum hepatitis is a handicap,[25] it clearly prohibited discriminatory conduct based on generalized fear of contagion. Under the Government's argument, even though students in *Carey* were handicapped, they would have been excluded from coverage under the Act because a general fear of their infectiousness motivated the discriminatory treatment they received.

At this time, there are no other cases which directly address the question of whether contagious impairments are handicaps. However, cases in which other impairments have been thought to be dangerous to the health or safety of others provide a useful analogy.

[25] The Second Circuit did not state explicitly, but seemed to base application of the Act on the fact that the children discriminated against were retarded.

In cases which presented the potential danger of a particular impairment, no court has ever held that any potential threat required the impairment to be excluded from the definition of a "handicap." Rather, these courts have consistently found such impairments to be handicaps within the meaning of the Act and focused on whether the person was, in spite of the handicap, "otherwise qualified" for the position in question.

Where safety concerns focus on the likelihood of reoccurrence of a medical problem, courts hold that the risk must be dealt with on an objective basis. See *Allen v. Heckler*, 780 F.2d 64 (D.C. Cir. 1985); *Doe v. Region 13 Mental Health-Mental Retardation Commission*, 704 F.2d 1402, 1411-12 (5th Cir. 1983); *Doe v. New York University*, 666 F.2d 761, 778-79 (2d Cir. 1981) based on pre-medical evidence.

In *Mantolete v. Bolger*, 767 F.2d 1416, 1421-1422 (9th Cir. 1985) the court noted the similarity between Sections 501 and 504 of the Act and proceeded to hold that in order to excude an epileptic individual from employment on the basis of possible future harm "there must be a showing of a reasonable probability of substantial harm. Such a determination cannot be made merely on an employer's subjective evaluation or, except in cases of a most apparent nature, merely on medical reports. The question is whether, in light of the individual's work history and medical history, employment of that individual would pose a reasonable probability of substantial harm."

In *Strathie v. Department of Transportation*, 716 F.2d 227, 230 (3d Cir. 1983), a school bus driver had been terminated because he had a hearing impairment which required him to use a hearing aid to hear adequately. A Department of Transportation rule excluded people who could not hear at a certain level without a hearing aid from obtaining bus driver positions. The Department justified the rule on safety grounds, contending that a

hearing aid could be lost, malfunction, or otherwise preclude the wearer from localizing sound on a noisy school bus. *Id.* at 232-33. The court found the plaintiff to be handicapped within the meaning of the Act. Although the court considered these safety concerns in its analysis, it ruled that such concerns did not require the impaired plaintiff be excluded from the Act's coverage.

Similarly, the safety consideration rationale was used by an employer to justify the firing of a truck driver with a medical history of epilepsy in *Costner v. United States*, 31 Empl. Prac. Dec. ¶ 33,446 (CCH) (E.D. Mo. 1982). The employer cited to a federal regulation which precluded any person with a medical history of epilepsy from driving trucks. The regulation was based on medical data that epileptics were more likely to be involved in accidents than nonepileptics, and that it was impossible to qualify epileptics for driving duties even if they had been seizure-free for any length of time. However, the potential dangers cited by the employer did not preclude the court from ruling that epilepsy is a handicap, as other courts had already held. *See also, Duran v. City of Tampa*, 451 F. Supp. 954 (M.D. Fla. 1978).

Blanket exclusion of tuberculosis and other infectious diseases from coverage of the Act is incongruous with the provisions of the Act which define as handicapped those persons who have a history of an impairment or are *thought* to have an impairment. 29 U.S.C. 706(7)(C). If the trial court's blanket exclusion of infectious diseases from the Act's protection is adopted by this Court, the outcome would be anomalous. Under such a construction, people who have been totally cured of an infectious disease, would not be covered by the Act.[26] These people

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[26] The last time Mrs. Arline was required to take a tuberculosis test was the summer of 1981. She is no longer scheduled or required to go back periodically for continuing exams (Tr. 76).

could be refused hiring, they could be fired, they could be demoted or they could be otherwise penalized with impunity because of their supposed physical condition. Actions taken as a result of beliefs regarding their disease simply would not constitute discrimination on the basis of a handicap. Such a result is surely inconsistent with Congress' language and intent. Likewise, those who never had an infectious disease but were only *thought* to have one, would not be covered by the Act. Congress did not intend these results. In passing the Rehabilitation Act, one primary goal was to protect persons who are stigmatized by their impairment.[27] Few handicaps are more stigmatizing than contagious diseases, and people who have a medical history of those diseases[28] are precisely the people who require federal protection. They are not automatically excluded from the protection of the Act.

F. An effect of a handicapping impairment cannot be segregated from the impairment itself in order to immunize discriminatory conduct from judicial review

The contention of the school board and the Government, raised for the first time on appeal to this court is best summarized by the Government's assertion:

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[27] *See Accommodating the Handicapped: Rehabilitating Section 504 after Southeastern*, 80 Colum. L. Rev., 171, 175 (1980).

[28] One testament to the stigmatizing nature of contagious diseases is the principle that a false accusation a person has such a disease has been found to be actionable as defamation under the common law. *See Atkinson v. Equitable Life Assurance Soc. of the United States*, 519 F.2d 1112, 1118 (5th Cir. 1975); *Campbell v. Jacksonville Kennel Club*, 66 So.2d 495, 497 (Fla. 1953). In *Kirby v. Smith*, 54 S.D. 608, 224 N.W. 230 (S.D. 1929), the Court held that an accusation that a clerk had tuberculosis stated a cause of action for slander, noting prophetically, "[w]e think that this would tend to injure her in respect to her profession or business. It imputes to her a general disqualification in respect to the occupation of a clerk and would certainly have a tendency to prevent her from procuring employment."

> [D]iscrimination based on contagiousness is not discrimination based on a handicap, even though persons with physical handicaps may be among those adversely affected by the discrimination.

Brief for the United States as Amicus Curiae supporting Petitioners at 12 (hereinafter cited as Gov't Brief).

The error of this position arises from an unsupported leap in logic—the segregation of a "health condition" from the handicap itself. Govt. Brief at 12. This statement appears to be contrary to the government's own previous admission that "a federal grantee or federal agency cannot avoid Section 504's nondiscrimination mandate simply by positing that its decision was based not on a handicap, but on some other ground." Gov't Brief at 11. Therefore, by its own admission, its analysis leads to an absurdity which would eviscerate the Act. If followed to its full extent, the Government's rationale would sanction discrimination against a wide range of handicapped individuals on the irrational basis of negative reaction to outward manifestations of handicapping impairments.

Counseling clients to avoid scrutiny under the Rehabilitation Act would become a simple matter under the Government's formulation. Rather than discriminating against an actual impairment, clients would merely need to articulate their reasons for imposing upon a handicapped person in terms of an outward manifestation of the handicap. Thus, while aversion to paralysis would not pass muster, discrimination based on a negative reaction to wheelchairs would.[29] Likewise, aversion for canes

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[29] "Discrimination motivated by an aversion to a cosmetic disfigurement would not, absent a perceived or actual nexus to a disabling condition, constitute handicap discrimination under Section 504. In contrast, if a federal program manager discriminated against an individual actually physically disabled—such as a person confined to a wheelchair—because of the manager had an aversion to the individual's handicap, he would clearly have violated Section 504." Gov't Brief at 15 n.12.

and dogs could with only a modest degree of indirection justify discrimination against the blind.

Moreover, the Government's position permits discrimination arising from unfounded fears. Grant recipients could refuse employment to cancer victims because of a fear, however uninformed, but nonetheless all too common, that cancer is communicable. Discrimination against polio victims presents an even better analogy to the present case. That disease, which historically has engendered reaction in the nature of public hysteria, is at early stages a communicable disease and also a most debilitating one in some cases. Franklin D. Roosevelt, a polio victim, could therefore have been denied program benefits by a federal grantee because of a fear that his polio remained contagious. While these illustrations seem simplistic, the logic in the Government's and Petitioner's position would allow the segregation of a manifestation of an impairment from the impairment itself. This would then permit the analysis of virtually any physical impairment in terms which would permit discrimination if only that discrimination is articulated as being based on a characteristic rather than the impairment itself.

The Government has administered this Act for thirteen years and now for the first time perceives a distinction between impairment and conditions of impairment. This distinction is contrary to thirteen years of regulatory interpretation.

The Government attempted to distinguish the fact that its own agency (HHS) defines a *condition* of a handicap, "cosmetic disfigurement," as an impairment by HHS. 45 C.F.R. 84.3(j). The Government's argument reached its ultimate absurdity in the following statement:

> Discrimination motivated by an aversion to a cosmetic disfigurement would not, absent a perceived or actual nexus to a disabling condition, constitute handicap discrimination under Section 504.

Gov't Brief at 5 n.12.

Viewed another way, if discriminatory animus against a handicapped person's cosmetically unappealing appearance may be prevented only if there is a "perceived or actual nexus" to the "disabling condition," the argument presented by the school board and the Government is self-defeating. A condition of a disabling disease is *ipso facto* related to the disabling condition. It is clear from the record that even if Mrs. Arline was minimally infectious or contagious, that condition had its nexus to tuberculosis. This nexus was certainly perceived by the superintendent, the anonymous parents, the staff, and the school board as justification for permanently terminating Mrs. Arline from her job of thirteen years.

In *Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372 (10th Cir. 1981), the court rejected the argument that discriminatory and conclusory reactions against a *condition* of the handicap of multiple sclerosis was not illegal discrimination. In that case a handicapped doctor was denied a psychiatric residency on the general assumption that patients, and in turn other doctors would react negatively to the fact that Dr. Pushkin was in a wheelchair. The Tenth Circuit also specifically rejected the general assumptions that the psychological and other side effects of Dr. Pushkin's drug treatment for multiple sclerosis could possibly create problems. Thus, in determining whether such discrimination was improper, the court focused on the discrimination which was directed toward a manifest condition of the handicap rather than the handicap itself.

G. Section 504 coverage of communicable diseases is consistent with the states' public health interests

The board and the Government argue that Section 504 coverage of contagious diseases interferes with the traditional federal-state balance of authority to regulate the public health, and suggest such a result was not contemplated by Congress. *See* Petitioner's Brief at 19-20; Gov't Brief at 9-10. Their contention misperceives the

actual state interest at stake, and ignores action taken by many states in this field.[30]

The Government's interest in controlling communicable diseases is unquestionably strong, but would not be well-served through the course urged by the school board and the Government. Protection of the public from contagious disease cannot even begin until carriers are identified and treated. Those afflicted with such diseases should be encouraged to seek treatment. However, the fear that seeking treatment may cost them their jobs, as in Mrs. Arline's case, is a powerful motivation for concealment. The American Public Health Association has urged this Court to recognize Section 504's coverage of communicable diseases for this reason, noting that "[r]emoving the fear of permanent job loss encourages prompt treatment. Thus, protection of the long range employment rights of tuberculosis patient *decreases* the possibility of infecting others and advances public health protection." APHA Brief at 16-17 (footnote omitted) (emphasis added).

That Congress intended Section 504 to cover people who may pose a safety risk is evident from concerns during its consideration of the 1978 Amendment relating to alcohol and drug abusers. Rejecting the House amendment which would have entirely excluded alcoholics and drug abusers from 504's coverage,[31] Senator Williams successfully argued that the safety risk posed by addiction was better addressed by *including* those persons within the Act's coverage. He stated that "[t]o add to the stigma by excluding such persons from protection under this law would only serve to encourage them to deny they have a problem rather than to admit it and seek treatment . . . ." 124 Cong. Rec. 30323-24 (1978).

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[30] *See* AMA Brief at 7-8 for a full discussion of state statutes regarding contagious diseases and public health.

[31] *See* previous discussion of Legislative history *supra* pp. 18-19, and Congressional Brief at 35-40.

It is also unreasonable to assume recognition of communicable diseases as within the Act's coverage would significantly alter the federal-state balance of public health regulation. State public health action has long been subject to federal review on constitutional grounds. *See Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967) (housing code and fire code violations struck on Fourth Amendment grounds); *Jew Ho v. Williamson*, 103 F. 10 (1900), *Wong Wai v. Williamson*, 103 F. 1 (1900) (quarantine and inoculation of twelve city blocks challenged under Fourteenth Amendment). These cases and areas of regulation were known well before the 1974, amendment of Section 504, and as stated in *Bowen v. American Hospital Ass'n*, 106 S.Ct. 2101 (1986), the Court will "presume that this [Federal-state] framework was familiar to Congress when it enacted § 504." *Id.* at 2113 (citing *Cannon v. University of Chicago*, 441 U.S. 677, 696-7 (1979)).

The argument that Section 504 coverage would interfere with state public health regulation also ignores the independent action of numerous states which recognize communicable diseases under their own handicap discrimination laws.[32]

In short, recognition of Section 504 coverage of communicable disease keeps the Act well within "manageable bounds," *Choate*, 105 S.Ct. at 720 and in fact, within the plain language, history and objectives of the Act. The weighty federalism concern in *Bowen*, that state regulatory agencies were being forced to enlist as "foot

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[32] *See* Brief for the Employment Law Center, National Gay Rights Advocates, Bay Area Lawyers for Individual Freedom, and Lambda Legal Defense and Education Fund as Amici Curiae supporting Respondent at 18-20 (hereinafter cited as ELC Brief); Brief for the Attorney General of California, *et al.* as Amici Curiae supporting Respondent at 1 (hereinafter cited as Attorney General's Brief).

soldiers in a federal crusade" 106 S.Ct. at 2120, is simply not present here.

H. The risk of contagion, as with all perceived risks arising from an individual's handicap, must be evaluated on a case-by-case basis

The Rehabilitation Act prohibits "reflexive reactions" to handicapping impairments which are "gounded in ignorance or capitulation to public prejudice." *Arline*, 772 F.2d at 765. The superintendent's recommendation of outright termination after thirteen years of competent service exceeded the expert's medical advice, and was heavily influenced by lay public reaction. In reality, Dr. McEuen characterized her decision to recommend the temporary removal of Mrs. Arline from her third grade classroom as based upon a "possible case of tuberculosis." The "mere possession of a handicap is not a permissible ground for assuming an inability to function." *Davis*, 442 U.S. at 405. Section 504 was designed to avoid assumptions about an impaired person's abilities, and rather to require precise case-by-case evaluation based on the individual's medical history. *Bentivegna v. United States Dept. of Labor*, 694 F.2d 619 (9th Cir. 1982); *Pushkin*, 658 F.2d at 1385.

Congress clearly intended to act against such prejudice by extending the benefits of the Act to persons ". . . *regarded* as having [a substantially limiting] impairment." 29 U.S.C. 706(7)(b)(iii) (emphasis added).

Statutorily impermissible assumptions are demonstrably inappropriate when applied to those handicapped by communicable illnesses. Contagion in general, and specifically contagiousness arising from a tubercular impairment, are not static concepts which can be generally or broadly applied. The fact that one has been infected with tuberculosis does not mean that person has developed the disease, or is contagious. AMA Brief at 4-5. Indeed, in this case the district court received undisputed evidence that the risk of contagion from contact with an individ-

ual who has tuberculosis is a matter of degree (J.A. 35-36.) Those with this impairment may become cured and never contagious (AMA Brief at 5); the possibility of being infectious may be "remote," (J.A.42) or "very minimal" (J.A.14), as was the case with Mrs. Arline when she was fired (J.A.42); or the risk may be progressively greater in degree (J.A. 7-8; AMA Brief at 5-6). Thus, as is clear from the medical evidence in this case concerning this one individual, a blanket exclusion of "possibly" infectious handicapped people exceeds medically necessary means to contain the risk.

In *Carey*, 612 F.2d at 644 previously discussed at 23, the potentially contagious school board acted on the same assumptions, and in the same *ad hoc* manner as did the school board in this case. The Second Circuit noted that "the Board is obligated to make at least some *substantial showing* in court that its plan is justified . . . ." *Id.* at 646 (emphasis added). The court then disapproved the quarantine plan because, in terms identical to those appearing in the *Arline* record, "[a]t trial, the Board was unable to demonstrate that the health hazard posed by the hepatitis B carrier children was anything more than a remote possibility." *Id.* The Second Circuit further characterized the record as lacking "any evidence that a serious possibility of transmittal existed. . . ." There the court criticized an *ad hoc* decision which imposed a disproportionate burden on the retarded children and which did not include a comprehensive, system-wide approach to hepatitis. The court's concerns in *Carey* were directed to the lack of the grant recipient's factual, medical basis for what amounted to capricious overreaction to a perceived danger. These concerns apply equally to the facts in this case.

The board failed to make at least some substantial showing that its permanent termination of Mrs. Arline was justified. On the medical record before both the board and the court, there was nothing more than a remote possibility that Mrs. Arline was infectious and a

risk to anyone. As in *Carey*, the board's action was an overreaction to an uninformed fear of danger.

II. MRS. ARLINE IS OTHERWISE QUALIFIED, DESPITE HER HANDICAP, TO PARTICIPATE IN THE SCHOOL BOARD'S PROGRAM

A. The Court does not need to reach the "otherwise qualified issue." Extending Mrs. Arline the same program benefits available to the non-handicapped would have allowed her continued employment

On the limited record before this Court it is clear that Mrs. Arline could have obtained meaningful relief simply by being afforded all of the benefits of the school board program which were available to nonhandicapped employees. As the trial judge specifically found, "the school board has a local policy which does permit working out of field or out of certification. . . ." while teachers attempt to obtain certification in other fields (Tr. 109). This program benefit was not extended to Mrs. Arline, and the denial of this benefit was based solely on her handicap.

The doctor testified that teaching older students who did not remain in a confined space with Mrs. Arline for long periods of time would have minimized any public health risk to an "acceptable" level.[33] The relief Mrs.

[33] Q. Would you have any hesitation at all—would you have had any—we're talking about back; then I realize you don't know what the status is today—but would you have had any hesitation to recommend that she teach high school students?

A. At that time I think that would have been acceptable, yes, sir.

Q. Now, when you say acceptable, what do you mean by that? That the risk—

A. I mean that there is always a risk, but the risk is considerably lessened in older people who are not spending all day long in the same room with the same teacher. That's what—

(J.A. 15-16)

Arline sought at trial was merely the nondiscriminatory application of benefits of job flexibility already available to non-handicapped employees. Thus, her qualifications to serve the school board system as a whole were not limited to the requirement of serving third grade pupils. Without the need for affirmative accommodation, Mrs. Arline is, on this record and as a matter of law,[34] entitled to the relief she seeks.

B. The determination of whether a handicapped person is "otherwise qualified" is fact-specific and does not allow the *per se* exclusion of those handicapped by a contagious disease

On the one hand, the school board presents Dr. McEuen's medical testimony that Mrs. Arline was contagious as justification for their decision to remove Mrs. Arline from the classroom. However, in actuality it totally disregarded that same expert's advice concerning possible accommodations under which any risk would be medically acceptable. It was Dr. McEuen's opinion that Mrs. Arline was safely employable within the school system even though she had tested positive in the past. The school board obviously accepted Dr. McEuen as an authoritative expert in their decision-making process. The school board should not be allowed to rely selectively on only those portions of an expert's advice which will support their actions, while rejecting other aspects of that same expert's advice which suggested a qualified and limited approach to the accommodation of Mrs. Arline's medical problem.

The issue of whether Mrs. Arline was "otherwise qualified" to remain a tenured teacher within the Nassau County school system was a mixed question of fact and law to be determined by the court. *Arline*, 772 F.2d at 764-765. Under this analysis, each case must be considered on an individual basis and upon its own unique facts. *Carey*, 612 F.2d at 649. *See also* AMA brief at

[34] *See infra* pp. 37-40.

18-19. This is precisely what the school board failed to do in this case. The school board had absolutely no justification to impose a blanket exclusion upon Mrs. Arline on the basis of her handicap. Mrs. Arline does not argue that she should have been allowed to teach third grade students while her handicap was in an infectious stage. She argues, however, that the school board could not justify permanent termination without first pursuing medically authorized accommodations. Over the short term, reasonable accommodation could have been accomplished simply by placing Mrs. Arline on a leave of absence until her tuberculosis was cured. Over the long term, periodic testing could have been used to assure Mrs. Arline did not have a recurrence of infectiousness.[35]

Under 45 C.F.R. 84.3(k), a qualified handicapped person is one who, with reasonable accommodation, can perform the essential functions of the job in question.

Whether a handicapped individual is otherwise qualified to participate in a federally funded program is ultimately a fact question concerning the reasonableness of accommodations which are available to afford meaningful participation to the handicapped. "Mere possession of a handicap is not a permissible ground for assuming inability to function in a particular context." *Davis*, 442 U.S. at 405. Decisions must be based on facts, not assumptions, and ultimately the determination turns on a fact-specific issue—the reasonableness of modifications which will accommodate the handicapped:

> However, the question of who is 'otherwise qualified' and what actions constitute 'discrimination' under the Section would seem to be two sides of a single coin; *the ultimate question is the extent to which a grantee is required to make reasonable modifications* in its program for the needs of the handicapped.

Choate, 105 S.Ct. at 820 n.19 (emphasis added).

[35] "Three reactivations of the disease of tuberculosis . . . are extremely rare in properly treated cases." AMA Brief at 8-9.

In Mrs. Arline's case, as Judge Vance noted, the trial court did not engage in the fact-specific analysis of determining "whether the defendant's justifications reflect a well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives, or whether they are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice." *Arline*, 772 F.2d at 764-765. On the record before this Court, it is clear that the school board bowed reflexively to public prejudice and uninformed fears about a disease which has widely varying degrees of contagiousness and which is capable of being quickly controlled. *See* p. 6 *supra*. The Act, and the case law which has construed the Act,[36] forbid blanket exclusions because a person's handicap may pose a risk to others.

As previously discussed, Congress followed this analysis in 1978 in refusing to amend the Act by adopting a *per se* exclusion of alcoholics and drug abusers.[32] The record demonstrates that merely extending to Mrs. Arline program benefits available to non-handicapped employees would, permit her to continue her career on a medically "acceptable" basis.

C. Legal standards require accommodation in this case

The risk of endangering others posed by a handicap is a legitimate consideration permitted by the Act, a self-evident proposition Mrs. Arline has never questioned. The Act's regulatory framework and interpretive case law guide the determination of the extent to which risk disqualifies a handicapped person from a Section 504 program. These principles were not applied to this case.

The standard for determining whether a handicapped person is "otherwise qualified" blends two of the Act's

[36] *Strathie*, 716 F.2d at 227; *Pushkin*, 658 F.2d at 1372; *Costner*, 31 Empl. Prac. Dec. 29,027 (E.D. Mo. 1982).

[37] *See supra* pp. 18-19.

provisions and requires a detailed factual analysis of the needs and limits of a grantee's program for its resolution. "Safety risk" cases such as this also require additional analysis of the actual nature of the risk at issue and the extent to which it can be reasonably accommodated.

This Court recognized in *Choate* that an "otherwise qualified" determination can be made *only* by factoring in the employer's obligation to reasonably accommodate the handicapped. *Choate*, 105 S.Ct. at 820 n.19. *Accord*, *Treadwell v. Alexander*, 707 F.2d 473, 477 (11th Cir. 1983) (a plaintiff who could perform the essentials of the job if provided reasonable accommodation would be entitled to relief). The accommodation overlay is an important modification of this Court's *Davis* requirement that to be "otherwise qualified," a person must meet all the program requirements "in spite of the handicap." The principle to be applied is that a program participant is "otherwise qualified" if he or she can meet the program's requirement in spite of a handicap, if provided reasonable accommodation.

The Fifth Circuit has noted that once a plaintiff meets the burden of demonstrating that she is qualified to perform the essential functions of the job, "the burden of proving inability to accommodate is on the employer." *Prewitt v. United States Postal Service*, 662 F.2d 292, 308 (5th Cir. 1981). *See also Mantolete*, 767 F.2d at 1423. The board made absolutely no showing that it is unable to accommodate Mrs. Arline's handicap.

The extent of the accommodation duty is fleshed out in the Act's regulations and decisions of the Court. *See* 45 C.F.R. 84.12. In *Choate*, this Court noted the criticism of its "affirmative action" language in *Davis* and stated the grantee's obligation to accommodate: the accommodation must be reasonable, and is unreasonable *only* if it would result in a "fundamental alteration in

the nature of the program." *Choate*, 105 S.Ct. at 720; *Davis*, 442 U.S. at 413-14.[38]

The "program" at issue in this case encompasses the operation of the entire school system. The Eleventh Circuit ruled, in a finding not before this Court, that the federal financial assistance which brought the board under the Act's coverage consisted of impact funds. *Arline*, 772 F.2d at 762. Because the record conclusively demonstrates that those funds were placed in general revenue and distributed proportionately throughout the entire system (J.A.70,76), this Court is not faced with a case in which the federal financial assistance only reaches one part of an overall school system operation. *See e.g., Grove City College v. Bell*, 104 S.Ct. 1211 (1984). The nondiscrimination and accommodation duties of the board are thus applicable to all operations of the school system, and it is the entire system which must be analyzed in determining what accommodation would be reasonable. *See* 45 C.F.R. 84.12(c) (size, type, and nature of operation all relevant to recipients duty to accommodate). No factual findings on these issues were made by the district court below.

The definition of Mrs. Arline's "job" within the grantee's program is equally broad. Since the duty to accommodate depends in large part on what the job to be accommodated is, *see* 45 C.F.R. Section 84.12(b), the definition of her job assignment was critical. Mrs. Arline was working under a tenured contract at the time of her dismissal which defined her employment as a "teacher." She was not a third grade teacher (although that is the

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[38] Far from suggesting that the school board fundamentally alter its program to accommodate Mrs. Arline, respondent suggests that it merely apply the benefit of teaching outside of certification in a non-discriminatory manner. Moreover, on remand the trial court could consider use of leaves of absence, such as those initially received by Mrs. Arline, which are clearly available under the program and therefore would not be an alteration of the program.

position she held), and her assignment under the terms of her contract was not limited to elementary school. (J.A.55) She was employed as a teacher by the board which presumably retains the flexibility on its side to reassign teachers to different grades as exigencies may dictate. In determining whether Mrs. Arline is otherwise qualified given accommodation, it is, at least, a teaching position anywhere within the entire school system which is relevant, not just elementary teaching.

D. Reasonable accommodations were available for use by the school board which would have allowed Mrs. Arline to continue in productive employment

If the Court wishes to entertain the question of whether reasonable accommodations were available to render Mrs. Arline "otherwise qualified," again the unrefuted record demonstrates a number of possible avenues. The only expert opinion available to the trial court and the school board demonstrated several medically acceptable approaches.

Dr. McEuen testified that there are sputum tests which were and are available to help determine contagion on an immediate basis (J.A.40-41); APHA Brief at 13-14. The classic diagnosis of tuberculosis is done by culture growth tests (J.A.23-24). A culture can grow in two weeks, but it would not be considered a negative culture for eight weeks (J.A.24). However, another method available to test if a person is infectious which gives immediate results is a microscopic sputum smear (J.A. 40-41). If the germs (the acid-fast bacilli) were visible, the person would be considered more infectious then if there were no organisms visible on the smear. The number of organisms which occurs after a culture growth is another method of determining infectiousness (J.A.41).[39]

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[39] Dr. McEuen's testimony before the school board was more complete than at trial. She advised the board that Mrs. Arline's cultures had very few bacilli present. *See generally* note 8, *supra*.

Dr. McEuen's testimony suggests that in the case of tuberculosis, contagion is the product of an interrelated probability analysis.[40] The extent of contagiousness of the tuberculosis carrier is a matter of degree,[41] and can be determined by sputum and culture testing. The degree of an individual's contagiousness can be established and monitored medically both on an immediate and long term basis. Once a sufferer tests negatively, as Mrs. Arline did subsequent to her termination, that person is no longer contagious.

Second, Dr. McEuen testified that the probability of contracting tuberculosis varies with the age of students. Younger students, although at a very minimal risk level, are relatively more susceptable than older students.

Third, contagiousness is proportionate with length of confinement in a closed environment with a carrier (J.A. 16; AMA brief at 6).

Fourth, one of the most obvious methods by which the school board could have accommodated Mrs. Arline was by placing her on a leave of absence[42] until treatment rendered her condition no longer contagious.

This analysis is parallel to that of *Mantolete*, 767 F.2d at 1422, where the Ninth Circuit noted that an employer "must gather all relevant information regarding the applicant's work history and medical history, and independently assess both the probability and severity of po-

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[40] For a mathematical model adopting cross-probability computations as a legal analytical tool, *see Castaneda v. Partida*, 430 U.S. 482, 497 n.17 (1977), *citing* Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv. L. R. 338 (1966).

[41] As Dr. McEuen testified: "The chances of getting tuberculosis would depend on three—the infectiousness of the case, the length of contact and the susceptibility of the individual" (J.A. 37-38).

[42] Leaves of absence were evidently available within the program, as Mrs. Arline herself received two over the three year course of time relevant to this case. On remand, the availability and costs of leave (including unpaid leaves) could be developed more fully.

tential injury. This involves, of course, a case-by-case analysis of the applicant and the particular job."

Thus, the record itself conclusively and without refutation demonstrates that Mrs. Arline could have been reasonably accommodated by the school board. It could have allowed her the benefit accorded non-handicap persons of teaching outside of certification. The school board should have, at the very least, considered allowing Mrs. Arline to teach older students or adult education students in an environment which called for hourly rotation in and out of class, while requiring her to undergo sputum tests which would have assessed any contagiousness contemporaneously.[43] With accommodations such as these, any risks would have been, according to the expert testimony of Dr. McEuen, much less and, perhaps, acceptable. The school board is not entitled to ignore medical or technological knowledge, as it did, in refusing to accommodate. *See Davis*, 442 U.S. at 412-413.

Had the fact-specific issues of accommodation and of whether Mrs. Arline was "otherwise qualified" to continue her 13 years of contribution to the school board's program been considered by the finder of fact, other means of accommodation could have been explored.[44]

E. Agency regulations endorse accommodations in the nature of those available to the school board

The federal agencies responsible for interpreting Section 504 have consistently required programs or activities receiving federal financial assistance to make reasonable

[43] The record suggests that such testing is at Public Health Department expense and hence would not be a financial burden to the school board.

[44] In this regard it is significant to note that government regulations mandate " 'adaptation of the manner in which specific courses are conducted' " for purposes of accommodating handicapped students. *Choate*, 105 S.Ct. at 721 n.21 citing 45 CFR 84.44(a) (1983). The mirror image of such accommodations should be explored for the benefit of a handicapped teacher.

accommodation for the handicapped. *See* 45 C.F.R. 84.12. The Department of Health, Education and Welfare[45] guidelines governing recipients of federal financial assistance, provide for:

> Reasonable accommodation.
>
> (A) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.
>
> (B) *Reasonable accommodation may include*: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) *job restructuring*, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.
>
> (C) In determining pursuant to paragraph (A) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include: (1) the overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget; (2) the type of the recipient's operation, including the composition and structure of the recipient's work force; and (3) the nature and cost of the accommodation needed.
>
> (D) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant, if the basis for the denial is a need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

45 C.F.R. Pt. 84.12. (emphasis added)

[45] The Department of Education, now responsible for disbursements of Title I and impact aid funds, has a current regulation identical to the one issued by HEW. *See* 34 C.F.R. 104.12.

In Mrs. Arline's case, the board admitted that it made no attempt at accommodation nor did it even investigate any such possibility.[46]

F. The school board failed to carry its burden of proving the unavailability of reasonable accommodations

Under the Rehabilitation Act, the burden is on the employer to show the applicant or employee could not safely and efficiently perform the essentials of the job even if reasonable accommodations were made, *Prewitt*, 662 F.2d at 310; *Treadwell*, 707 F.2d at 475, and to show its inability to accommodate the applicant or employee. *Prewitt* at 310. *See also Nelson v. Thornburgh*, 567 F.Supp. 369 (E.D. Pa. 1983), aff'd, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 955 (1985); *see supra* p. 15.

It is not sufficient for an employer merely to cite a possibility of danger to the health or safety of others to be relieved of its responsibilities under the Act. In *Carey*, 612 F.2d 644, the Second Circuit refused to uphold the school board's decision to exclude mentally retarded children from classes when they were found to be carriers of serum hepatitis. The court acknowledged the school board's actions in that case "involved the very essence" of the state's power to protect the health, safety and welfare of its citizens, *id.* at 648, but refused to give conclusive deference to the board's decision. The court found the school board was unable to demonstrate anything more than a "remote possibility" the children posed a health hazard. *Id.* at 650.[47] The presence of Mrs.

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[46] Q. At any time did you investigate the possibility of allowing Mrs. Arline to work in some other capacity within the school system?

A. No, sir, I did not. (J.A. 53)

Moreover, the record reflects no analysis of leaves of absence available under the collective bargaining agreement.

[47] The court in *Carey*, as have other courts cited *supra*, shifted the burden to the agency of justifying its policy after a *prima facie* case of discrimination was established.

Arline in the classroom, as similar to the mentally retarded children in *Carey*, only posed a very minimal risk to the third grade children and an acceptable risk for her to teach older students from a public health perspective.

Similarly, in *Costner*, the Court rejected a blanket exclusion of people with a history of epilepsy from driving trucks, even though there was substantial medical evidence to supporting the applicable regulation. The court noted that the individual had been seizure-free for twenty-one years, had not had a driving accident for fifteen years, and a doctor had testified that the individual was at no significant risk of seizure.

In *Strathie* the Third Circuit rejected a number of safety concerns proffered by the Transportation Department to justify its regulation forbidding hearing-impaired persons from driving school buses. The court stated that the nature of the program was to prevent "any and all *appreciable* risks." *Strathie*, 716 F.2d at 232 (emphasis supplied).

In this case, the school board did not meet its burden of establishing there was an appreciable danger in permitting Mrs. Arline to work under some other reasonable accommodation. This fact is irrefutable because the Petitioner admitted it did not even consider any accommodation at all (J.A.53-54). The State Tuberculosis Control Center Assistant Director made it clear the risk of infection was very minimal and that there were numerous jobs Mrs. Arline could perform safely, such as teaching older children, adults, or working in a "nonstructural setting" (J.A.15,18-19). The doctor testified there was no reason to disqualify Mrs. Arline from any other job (J.A.21), and that the risk of continuing her career in some other position would have been acceptable (J.A.22). Mrs. Arline herself suggested several potential methods by which the school board could reasonably and safely accommodate her illness, and at trial establish the

existence of board policy permitting teachers to work out of certification (J.A.54-55; Tr.109). The board admitted there were positions open with the board which included teaching older children and adults, or working in non-structured settings (J.A.59,61).[48]

The superintendent admitted non-medical reasons played a role in his decision to fire Mrs. Arline (J.A.63, 81-82). He rejected the doctor's expert analysis of the risk involved, and justified the decision to terminate Mrs. Arline on his own unscientific and unsubstantiated analysis that he would not permit Mrs. Arline to work where there was "a danger" (J.A.62). He freely admitted that he did not make the first effort to investigate if it was possible to find Mrs. Arline a job where she could work without being an unacceptable risk to other individuals (J.A.53).

The board's decision to terminate Mrs. Arline because of her handicap is precisely the type of behavior Congress intended to prohibit with the passage of the Rehabilitation Act of 1973. Under the Act, employers are expressly prohibited from acting on their own prejudices and misconceptions about diseases in making employment decisions. Nor are they permitted to take action based on the unfounded fears of coworkers and the public.

The arbitrariness of the board's actions in this case is highlighted by the inconsistency in its treatment of Mrs. Arline. She suffered mild relapses of tuberculosis in 1977 and 1978, and both times after successful treatment was permitted to return to work (J.A.48-50). Apparently the board concluded it was safe to reinstate Mrs. Arline after the first two relapses. There was absolutely no credible reason to support the board to treat her differently

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[48] The board did not address why it did not consider simply granting Ms. Arline an extended leave of absence, paid or unpaid, until the tuberculosis was cured, instead of permanently terminating her.

because of a third relapse. The doctor testified that it could not be concluded that Mrs. Arline would have any more relapses and, in fact, suggested she would not (J.A. 31). Furthermore, the doctor testified that the last time Mrs. Arline was tested in May of 1981, the test was negative. The doctor had no record of any more positive tests to date (J.A.20), and stated that the present infectiousness of her disease is "remote" (J.A.42). The board has not met its burden of showing Mrs. Arline could not have been safely accommodated. The evidence is that it made no such effort, even though safe alternatives were available. As one commentator cogently stated:

> Handicap discrimination is fostered, not by the invidious motives that resulted in discrimination against blacks, females and immigrants, but by myths that advanced medical knowledge has only recently begun to dispel, by ignorance as to the effects of a disability, by misconceptions as to the work capacity and needs of the afflicted individual, and by benign or compassionate attitudes.

Guy, *The Developing Law on Equal Employment Opportunity for the Handicapped: An Overview and Analysis of the Major Issues*, 7 U. Balt. L. Rev. 183, 277 (1978).

This court should not permit Mrs. Arline's thirteen years of competent teaching experience to be washed away, and for her to be stigmatized and shunned because of her employer's unjustifiable reliance on medically undocumented assumptions. At the very least, the school board was required to consider and follow an objective process which was based upon rational, competent evidence and reasoning under the Act, before depriving Mrs. Arline of her livelihood.

CONCLUSION

The Eleventh Circuit's holding that Mrs. Arline is a handicapped person entitled to Section 504 protection against discrimination is due to be affirmed. The language of the statute itself, as well as its legislative history, the regulatory framework and case law compel this result. Likewise, on a limited record which discloses no effort by the Petitioner school board to accommodate Mrs. Arline's handicap, the Eleventh Circuit correctly remanded for further proceedings concerning this fact-specific issue.

Respectfully submitted,

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